

Li (Migration) [2018] AATA 3594 (20 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Shuxiang Li
CASE NUMBER:	1702477
DIBP REFERENCE(S):	BCC2015/1732730
MEMBER:	Karen McNamara
DATE:	20 August 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations; and • cl.820.221(1)(a) of Schedule 2 to the Regulations.

STATEMENT MADE ON 20 AUGUST 2018 AT 2:21PM

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether a genuine spousal relationship exists – Moderate pooling of financial resources – Relationship represented to others as genuine and ongoing – Relationship viewed as continuous and ongoing by parties – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. On 16 June 2015, Ms Shuxiang Li (the applicant), applied for a Partner (Temporary) (Class UK) and BS Partner (Residence) Visa. The application was made on the basis of her relationship with Mr Ning Yang. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
2. On 31 January 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the applicant was the spouse of the sponsor. As a result the applicant did not satisfy cl.820.211(2)(a) and therefore did not satisfy cl.820.211 of Schedule 2 to the Regulations. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 10 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Ning Yang (the sponsor) and Mr Solomon Abebe Asfaw (former tenant), Mr Danny Huang (friend) and Mrs Yan Cheng (sponsor's mother). The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicant provided at hearing a bundle of documentation in no particular order and unreferenced. The documents included:
 - Receipts for the payment of rent,
 - Mobile telephone accounts,
 - Receipt from Storage King Hurstville,
 - Tax invoices to the business B2C marketing,
 - Motor vehicle certificates of registration,
 - Letter titled '*reference for a marriage couple*' from Danny Huang dated 6 July 2018,
 - ASIC company extract,
 - Various photographs of the sponsor and applicant,
 - NRMA car insurance certificate,
 - NSW Fair Trading advice of lodgement of bond,
 - Letter from Medicare to applicant dated 19 December 2017,
 - Letter to applicant from St George Bank dated 4 June 2018,
 - NSW Department of Health admission form,
 - Tiger Air tax invoice and boarding passes and details of accommodation,
 - Residential tenancy agreement for Glen view Street,
 - Kogarah Bay, St George bank statements.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.
- 6.

7. Background

8. The applicant was born in Shandong Province, China in 1974. She was previously married in China and divorced in 2002. She has a son to her former husband who lives in China with his paternal grandparents. The applicant told the Tribunal that she has not maintained a relationship with her son. On 19 March 2015 she entered Australia as the holder of a FA (subclass 600) visa which was valid until 19 June 2015. On 16 June 2015 she lodged a Partner (subclass 820/801) visa application and was subsequently granted a Bridging WA (subclass 010) visa which she currently holds.
9. The sponsor was born in 1964 in Fuzhou, China and became an Australian citizen in 1990. He does not have any family living in Australia.
10. The Tribunal was told that the applicant met her sponsor Mr Ning Yang at a friend's house in Hurstville on 23 March 2015. They commenced a relationship on 18 April 2015 and married on 22 May 2015.

11. CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
13. The Tribunal has before it the Department's and the Tribunal's files relating to the applicant and a copy of the Department's decision provided by the applicant to the Tribunal.

Whether the parties are in a spouse or de facto relationship

14. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal was told the parties were married on the 22 May 2015, no marriage certificate is before the Tribunal to confirm this. However the delegate's decision of 31 January 2017 notes the applicant provided with her primary application, a copy of the marriage certificate to the Department. The delegate found that the applicant and sponsor were in a married relationship. The Tribunal therefore has given weight to the delegate's notation of the existence of the certificate and finds that there is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
17. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b) - (d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
18. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
19. The Tribunal had the benefit of oral evidence from the applicant and sponsor at the hearing and found their evidence to be detailed, consistent and overall credible. The Tribunal has given due regard to all evidence provided by the parties and witnesses at the Tribunal hearing and that provided by the applicant to the Department and Tribunal.
20. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spousal relationship met?

21. *Financial aspects*

22. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
23. The parties told the Tribunal that between them they operate five bank accounts, of which two are joint accounts; one is a business account and the remainder personal accounts. The Tribunal has before it statements associated with a St George joint account. The statements before the Tribunal show evidence of the account being used for the purchase of low value household items from supermarkets and payment of rent, utility bills and social activities. Deposits into this account are predominately made via transfer from another St George account and ATM deposits. The Tribunal was told that the applicant and the sponsor have their respective wages paid by bank transfer into their respective personal accounts.

24. Ms Li works as a massage therapist at two locations. One location pays her wages in cash and the other by direct deposit into her personal account. Until recently her wages from this employer were deposited into the business account. Cash payments from the other employer are used to purchase groceries and items from the butcher.
25. Mr Yang works as a graphic designer and his wages are deposited into his personal account. The sponsor is the owner and sole director of a registered business called B2C Marketing Pty Ltd of which the applicant is a shareholder. The Tribunal was told the company imports items from China and the sponsor recently imported 100 smart toilet seat covers, purchased with funds from the parties' joint account. The couple recently purchased a van for the business using their joint savings. The vehicle is registered and insured under the company name.
26. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including income, personal accounts, their joint accounts, daily living expenses, rent payments, debit card usage, household purchases and the importing business.
27. The parties do not have any joint ownership of real estate or any major assets. They are joint shareholders in the business B2C Marketing Pty Ltd but the applicant is not an office holder. They share the assets of the business which are the motor vehicle and the stock of toilet seats. There is no evidence of any one person in the relationship owing any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to pool their financial resources and have a financial plan for the future in so far as getting the importing business up and running and buying a house. The Tribunal places moderate weight on the financial aspect of the relationship.

28. *Nature of the household*

29. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, if any, the living arrangements and daily routine of the parties and the sharing of the responsibility for housework.
30. The couple provided evidence that they have been living together at Banksia since February 2017. The sponsor sublets the premises to two other people. The house has three bedrooms which the applicant told the Tribunal she shares bedroom with the sponsor. The parties gave detailed and consistent evidence about their living arrangements at their current and previous address at Kogarah Bay, which they also shared as a sub-lease arrangement.
31. The parties provided detailed and consistent evidence of their personal history, living arrangements and household responsibilities, purchasing household items and their daily routine and activities. The parties told the Tribunal that they share the housework but on weekends the sponsor does the bulk of household chores as the applicant is at work.
32. The parties provided additional documentary evidence in individual and joint names including bank statements, Tenancy agreements, ASIC extract showing the parties as joint shareholders and telephone accounts
33. The Tribunal accepts that the parties live together and that they have established a joint household. The Tribunal accepts that they share the responsibility for the household duties and live in a shared household under a sub leasing arrangement.

34. *Social aspects*

35. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
36. The Tribunal notes there are limited statements from third parties who express their view that the relationship is a genuine one. The Tribunal places little weight on these statements as they do not give any convincing reasons as to why they believe the relationship to be genuine or give any insight into the development of the relationship.
37. The Tribunal has given weight to evidence provided at the hearing by the applicant, sponsor, Mr Solomon Abebe Asfaw, Mr Danny Huang and Mrs Yan Cheng in regard to social activities undertaken by the parties. Both applicant and sponsor told the Tribunal that they enjoy dining out and visiting friends. Recently they travelled together to Cairns for a holiday and last year went to Forster. Both contribute to paying for their social activities. At home they enjoy cooking together and having BBQ's.
38. Danny Huang provided evidence by telephone. He told the Tribunal that he is a close friend of the sponsor and that he and his wife socialise with the sponsor and applicant on a regular basis and that they have attended parties together and travelled together to Jervis Bay. He was a witness at their marriage and believes from his observations and interactions with the parties that they love each other.
39. The parties provided photographs of themselves socialising with family and friends and of their wedding. The photographs were supported by the oral evidence of the parties in so far as identifying to the Tribunal the names of the people in the photographs and elaborating on the events depicted in the photographs.
40. The Tribunal accepts the applicant and the sponsor plan and undertake social activities together with friends (neither have relatives in Australia) and represent themselves as being in a spousal relationship to other people. The Tribunal accepts that the parties' relationship is socially recognised by family and friends. Although there are limited statements from third parties who express their view that the relationship is a genuine one, the Tribunal is satisfied that friends and relatives view the relationship as a genuine and committed one.

41. Commitment

42. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
43. The parties claim to have first met at mutual friends BBQ on 23 March 2015. They began their relationship on 18 April 2015 and married on 22 May 2015. Both told the Tribunal that their marriage date was significant as it was also the birthdate of the sponsor. To date, the applicant and sponsor have been in a committed relationship having lived continuously with each other for approximately three years.
44. Mr Asfaw told the Tribunal that he previously lived with the couple at Kogarah Bay and that the parties shared a bedroom and ate together. They had their arguments but overall their behaviour appeared to him to be that of a typical married couple.
45. Mrs Cheng provided evidence via telephone from China. The Tribunal placed little weighting on her evidence as she could provide little insight into her son's relationship with the applicant other than she believes they love each other and hopes they can stay together.

46. The applicant and sponsor provided detailed and consistent evidence of their life together and as a family. The parties provided oral and documentary evidence of their financial plans and a future together through working hard to save for their own home and seeing the import business make money.
47. Based on the evidence provided, the Tribunal accepts that the applicant and sponsor were in a genuine and continuing relationship and did not live separately and apart on a permanent basis at the time of application.

48.

49. The Tribunal is satisfied that the applicant and the sponsor provide each other a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.

50. Findings

51. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship, as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.
52. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian Citizen who had turned 18.
53. The applicant's movement records evidence her having been the holder of a Bridging WA (subclass 010) visa at the time of application. She held this visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 16 June 2015. As the applicant held a substantive visa at the time of application, further requirements in cl.820.211(2)(d) need not be met.
54. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
55. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a) of Schedule 2 to the Regulations.
56. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for Subclass 820 visas.

57.

58. DECISION

59. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations; and

- cl.820.221(1)(a) of Schedule 2 to the Regulations.

Karen McNamara
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).